No. 391.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

H. W. BAKER,
Defendant in Error.

Error to the United States Circuit Court for the District of Washington,

NORTHERN DIVISION.

Petition for Rehearing.

GEO. H. FEARONS,
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Attorneys for Plaintiff in Error.

H. S. CROCKER CO., PRINTERS, S. F.

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PETITION FOR REHEARING BY PLAINTIFF IN ERROR.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The great hardship of this case to our client, the unconscionable advantage given to the defendant in error, the conviction that the principle contained in

Rule 22 has been carried to a greater extent in this case, than in any of the cases cited in the opinion of the Court, or any other case we have been able to find, impels us respectfully to ask this Honorable Court for a rehearing of the case, for the following reasons :

I.

Assuming Rule 22 to be imperative to its fullest extent, no other Court has decided that where the judge *prohibited* counsel from complying with it, that the exceptions were deemed waived. The language in the record is unmistakeable. "This Court refused in all cases to allow exceptions to be taken in the presence of the jury, *and would not have allowed exceptions to be so taken in this case, had it been asked.*" This was one of the rules of the Court, and in all cases the Court refused to obey its own rule, or allow counsel so to do. Counsel knew the fact, how could they prevent the result? If the Court would not allow in this, or in any other case, the rule to be obeyed, by what means, or act, could counsel have compelled the Court to observe its own rule? By insisting upon such observance, they might have been fined, or imprisoned for contempt, but they could not have had their bill of exceptions settled and signed by the Court.

The record shows that the fault was not in the counsel but in the Court itself, and that a client should be mulct in damages solely for the reason that the Court would not obey its own rules, or allow counsel to do so, is evidently unfair and oppressive. In order that this Court can properly say that it will not hear exceptions

taken to the ruling of the Circuit Court, there should be some fault on the part of the litigant, or counsel. In this case no such dereliction of duty appears. The whole trouble was caused by the unyielding refusal of the Court to allow that to be done, that Rule 22 required to be done. The mere statement, without comment, or argument, presents this branch of the case as strongly as we can do it.

II.

It has never been held that the formal bill of exceptions under a similar rule must have been settled and signed by the judge before the jury leaves the box. The doctrine, as we understand it, is that no exception will be considered in the Appellate Court that was not taken at the stage of the trial when the cause for the exception arose.

In *Walton* vs. *U. S.*, *9 Wheaton 651–657*, Mr. Justice Duval said: "It is a settled principle that no bill of "exceptions is valid which is not for matter excepted to "at the trial. We do not mean to say that it is neces- "sary (and, in point of practise, we know it to be other- "wise), that the bill of exceptions should be formally "drawn and signed, before the trial is at an end. It "will be sufficient if the exceptions be taken at the "trial, and noted by the Court, with requisite certainty; " and it may afterwards, during the term, according to "the rules of the Court, be reduced to form and signed "by the judge; and so, in fact, is the general practise."

In *Turner* vs. *Yates*, *16 Howard*, *14–29*, Mr. Justice Curtis, speaking for the Supreme Court, said: "The

"record must show that the exception was taken at that "stage of the trial when its cause arose. The time and " manner of placing the evidence of the exception, for- " mally on the record are matters belonging to the " practice of the Court in which the trial is held. The " convenient dispatch of business, in most cases, does " not allow the preparation and signature of bills of " exception during the progress of the trial."

In *U. S.* vs. *Britling*, *20 How.*, *252*, Mr. Chief Justice Taney said: "The attention of this Court has, upon " several occasions, been called to this subject, and the " rule established by its decision will be found to be this: " The exception must show that it was taken and re- " served by the party at the trial, but it may be drawn " out in form and sealed by the judge afterwards."

In *U. S.* vs. *Carey*, *110 U. S.*, *51*, *52*, *3 sub. ce 424*, Mr. Chief Justice Waite said: " The rule is well es- " tablished and of long standing that an exception to be " of any avail must be taken at the trial. It may be " reduced to form, and signed, afterwards; but the fact " that it was seasonably taken must appear affirmatively " in the record, by a bill of exceptions duly allowed or " otherwise."

In *Phelps* vs. *Mayer*, *15 Ho.*, *160*, Mr. Chief Justice Taney in delivering the opinion of the Court, after stating substantially the same doctrine announced in the cases above referred to, said: " Nor is this a mere " formal or technical provision. It was introduced and " adhered to for purposes of justice. For if it is " brought to the attention of the Court that one of the

" parties excepts to his opinions, he has an opportunity " of reconsidering, or explaining it more fully to the jury " and if the exception is to evidence, the opposite party " might be able to remove it by further testimony if " apprised of it in time."

III.

In this case there were objections to the testimony and to the instructions of the Court made at the time the testimony was given during the progress of the trial and at the time the instruction was given to the jury and before the jury retired to consider their verdict. The first objection we note is found on page 37 of the record and was taken to the testimony of the plaintiff when he was detailing the statements of Mr. Brown, the manager of the defendant at Seattle, as to conversation that took place after the message was delivered. Upon that subject the record is as follows: " Counsel for defendant objects to the witness stating " the declarations of Mr. Brown after the occurrence, " for the reason that the same is irrelevant, immaterial " and incompetent and not binding upon the company. " Which objection is by the Court overruled and an " exception noted for defendant." (Record, page 37).

The second exception was to the testimony of the same witness in regard to his conversation with Michael J. O'Leary, chief clerk of the Cable Message Bureau of the Western Union Telegraph Company in New York. Upon that subject the record is as follows: " Counsel " for defendant objects to the witness relating his con- " versation with Mr. O'Leary, on the ground that the

"same is irrelevant, immaterial and incompetent and "no proper foundation has been laid." Which objection is by the Court overruled and an exception noted for the defendant. (Record, page 38).

It does not require the citation of authorities to show that this ruling was erroneous. After the message had been received by the plaintiff and the transaction closed it is clear that no declaration of an employé of the company could be binding upon the plaintiff herein. The refusal of the Court to exclude the evidence is properly in the bill of exceptions as finally signed by the Court and comes here for review.

The third exception is to the exclusion of the testimony of E. H. Brown, manager of the plaintiff in error at Seattle as to a book of rules and regulations and tariff in use adopted by the International Telegraph Convention, being the rules and regulations controlling the telegraphic service all over the world outside of the United States. The witness recognized the book as a book of rules and regulations and tariff in use and adopted by the International Telegraph Convention, and as containing the rules and regulations on which messages were received, and was proceeding to state to the Court the countries adopting the system and what it contained when Mr. Carr objected to the introduction of the book. The record upon that subject is as follows: "Mr. Carr. We contend that it is not proper or "necessary for him to state what this book contains. "Q. By Mr. Burleigh. Just state whether New South "Wales was a party to that convention. A. Yes, sir. "New South Wales represented by Frances D. Bell.

"Defendant offers in evidence the book identified by "the witness, particularly paragraph 13, pages 17 and "18, in reference to telegraphic messages and addresses, "being the rules and regulations controlling the tele- "graphic service all over the world outside of the "United States, on the theory that a message sent at "Sidney, New South Wales, over the Government lines "was subject to the rules and regulations, and that Mr. "Baker has not any rights superior to the man who "sent the message at that point. Plaintiff objects as "irrelevant, immaterial and incompetent. Objection "sustained. Exception noted for defendant." (Record, 119, 120).

We contend that a book of rules and regulations adopted by an international telegraph convention and acted upon by all the telegraph companies outside of the United States, including New South Wales, and in accordance with which cable messages were received, transmitted and delivered throughout the telegraph world outside of the United States, was material and proper to be received in evidence, not indeed that the Court would be bound to take such rules and regulations as an absolute guide in telegraphic business, but to enable the Court to see whether the rules adopted by that convention, contained in that book and acted on by telegraph companies were reasonable and just; and that the exclusion of the testimony was error.

On page 136 of the record it was said: "The Court "directs your attention to the testimony given by the "depositions of Michael J. O'Leary and G. R. Mock- "ridge and Edward Chambers, and instructs you that

" neither one of said witnesses are shown to be compe-
" tent to testify as to the manner in which the tele-
" graphic message in question was transmitted over the
" wire between any points or received at any point on
" its route. These witnesses do testify to facts which
" are proper to be considered in this case bearing on
" the question as to whether the message was properly
" received, or properly delivered I should say, to this
" company.

" They show what was on file at the different offices,
" at Penzance and New York, but the point of this
" instruction is that they are not good witnesses to
" prove the condition in which the message came to the
" office at Penzance; they are giving, not the best evi-
" dence, but secondary evidence. They can only testify
" as to what some other person has placed in the records
" in their office, or has said about the matter; and the
" law requires that the witness should give his testi-
" mony under oath, the same as other witnesses, in
" order to make it of the same character and degree of
" credibility and reliability as the other testimony in
" the case. Because they are repeating to us here
" unsworn testimony is why I instruct you their testi-
" mony is not good to prove the fact in the case as to
" the condition of the message when transmitted from
" Porthcurno to Penzance."

On the same day this charge was given to the jury and after it was given, and while the jury were still in the box, the following occurred in Court as shown by the record: " Mr. Burleigh. Before the jury retires there
" is one point I want to suggest to your mind. I ask

" the Court to further instruct the jury on the point
" that is suggested by an instruction requested by the
" plaintiff, and which I did not notice until the Court
' read it. The Court instructed the jury and ex-
" plained to the jury the competency and legal effect of
" the evidence of Mockridge and Chambers superin-
" tendent and manager of the Western Union Tele-
" graph Company at Penzance, the effect of which in-
" struction was that they were not competent to testify
" to the telegram as it came to the Penzance office, or at
" least that it was not shown that they were competent.
" I would like to have your Honor instruct the jury
" that they were competent to testify to the originality
" of the paper which attached to their depositions as the
" copy made at the time of the receipt of the original
" telegram as it existed in that office and that telegram
" made at the time is the best evidence of the contents
" of the telegram received at that office obtainable; in
" other words, that this telegram which is attached to
" this deposition being identified as the original copy
" in the Penzance office made at the time of the receipt
" of the telegram is the best evidence of the contents of
" the telegram received there.

"THE COURT: I think you are going a little too
" far in what you claim there, Mr. Burleigh, about its
" being the best evidence of the telegram actually re-
" ceived there. According to the testimony the tele-
" gram received at Penzance came by sound, and the
" very best evidence of what was received in the office
" at Penzance would be the testimony of the person
" who heard the sounds and recorded them. I do not

" know how far our statute may have made a telegram " after it is transcribed legal evidence, but I do not " think it would apply to a case of this kind or dispense " with the proof as to what was transmitted by sound to " that office.

" I want the jury to understand by what I have said " that the testimony of these witnesses who have given " their depositions here, Mr. Chambers and Mr. Mock- " ridge, is the best evidence obtainable as to what the " files in the office at Penzance show was received as the " message, and it is competent for that purpose, as I " have said, that it is competent to be considered as " bearing on the question, but is not the best evi- " dence as to how the message was transmitted from " Porthcurno." (Rec. 145, 146, 147.)

After this instruction was given to the jury counsel for the defendant requested the Court to instruct the jury as follows: " I would like to have your Honor " instruct the jury that Mockridge and Chambers, " superintendent and manager respectively, of the " Western Union Telegraph Company at Penzance, " were competent to testify to the originality of the " paper which is attached to their deposition as the copy " made at the time of the receipt of the original tele- " gram as it existed in that office and that that tele- " gram made at the time is the best evidence of the " contents of the telegram received at that office obtain- " able; in other words, that this telegram which is " attached to this deposition, being identified as the " original copy in the Penzance office, made at the time " of the receipt of the telegram is the best evidence of " the contents of the telegram as received there.

" Which instruction was refused by the Court and to " the refusal of the Court to give such instruction, the " defendant then and there excepted." (Rec. 160, 161.)

We have quoted thus fully from the record to show that this exception was within the rule as stated by Mr. Chief Justice Taney in *Phelps* vs. *Mayer*, *supra*. This precise question of the character of the evidence of Mockridge and Chambers was brought distinctly before the Court, giving the Court a full opportunity after it had charged the jury upon that point, of reconsidering his opinion upon that subject. The Court was in full possession of the views of the counsel for the defense, knew precisely what the testimony was and could have been in no way misled upon the subject. The Court also knew that Mockridge had testified as follows: "A. " I produce the said original message delivered by the " Eastern Telegraph Company to the Western Tele- " graph Company on October 1, 1891, and it is annexed " to this deposition and marked Exhibit A." (Record pages 81, 82.)

The Court also knew that in answer to the following question, " Was any message received by the Western " Union Telegraph Company on October 1, 1891, at " Penzance, from Sidney, Australia, addressed to " Baker, Seattle, and reading: 'Offered four pounds thou- " 'sand cif advise accept market dull no outlet,'" the witness Mockridge answered " No." (Record, page 83.)

The Court also knew that in answer to a question the witness Mockridge had said: " We did transmit the " message as it was received. I admit that we did

" transmit the message. The message was transmitted " from the Western Union Telegraph Company's office " for which I am acting, as follows: 'Barker, Seattle, " 'offered four pounds thousand cif advise accept market " 'dull no outlet.'"

The Court also knew that the only testimony concerning the reception at Penzance and the transmission of the message was contained in the depositions of Mockridge and Chambers, and that in those depositions there was not a scintilla of evidence that any person except Mockridge had anything to do with receiving or transmitting the message. The depositions were before the Court and especially called to its attention after the Court made the charge and while the jury was present, and instead of modifying or reconsidering its charge, he reaffirmed it and injected into the evidence an imaginary operator that he insisted was the only competent witness to prove the reception and transmission of the message.

We submit that this was error and that the counsel properly brought the matter before the Court and that this exception was taken in due time.

IV.

Section 914 of the Revised Statutes of the United States provides that "The practise, pleadings, and " forms and modes of proceeding in civil causes, other " than equity and admiralty causes, in the Circuit and " District Courts, shall conform, as near as may be, to " the practice, pleadings, and forms and modes of pro- " ceeding existing at the time in like causes in the

"courts of record of the State within which such Cir-
"cuit or District Court are held, any rule of Court to
"the contrary notwithstanding."

"Exception to charge to jury. Exceptions to a charge
"to a jury, or a refusal to give as a part of such charge
"instructions requested in writing, may be taken by
"any party by stating to the Court, after the jury shall
"have retired to consider their verdict, and, if practic-
"able, before the verdict has been returned, that such
"party excepts to the same, specifying, by numbers of
"paragraphs or otherwise the parts of the charge
"excepted to, and the requested instructions the refusal
"to give which is excepted to, whereupon the Judge
"shall note the exceptions in the minutes of the trial,
"or cause the stenographer (if one is in attendance) so
"to note the same."

Laws of Washington, 1893, page 112, paragraph 4.

"Exceptions to any ruling upon an objection to the
"admission of evidence offered in the Court of trial or
"hearing need not be formally taken, but the question
"put, or rather offer of evidence, together with the objec-
"tion thereto and the ruling thereon, shall be entered
"by the Court, Judge, referee or commissioner (or by
"the stenographer, if one is in attendance) in the minutes
"of the trial or hearing, and such entry shall import an
"exception by the party against whom the ruling is
"made."

Laws of Washington, 1893, page 112, paragraph 5.

The statutes last-above quoted were in full force at the time of the trial of this cause in the Circuit Court.

In Sears vs. Eastburn, 10 How., 186, Mr. Chief Justice Taney, speaking for the Court, said: "The act of "May, 1828 (4 Stat. at L., 278), in express terms, "directs that the forms and modes of proceeding in the "courts of the United States, in suits at common law "in the States admitted into the Union since 1789, "shall be the same with those of the highest court of "original jurisdiction in the State. Alabama is one of "the States admitted since 1789; and the act of Con- "gress, therefore, makes it obligatory upon the courts "of the United States to conform in their mode of pro- "ceeding to the law of the State. The law of the "State itself, undoubtedly, was not obligatory upon "the courts of the United States, but it is made so by "the act of Congress."

See, also, to the same effect:

Perkins vs. Watertown, 5 Biss., 320.
Lewis vs. Gould, 13 Blatch., 216.
Weed Sew. Machine Co. vs. Wicks, 3 Dill., 261.
Thomson vs. R. R. Companies, 6 Wall., 134.

In the trial of this cause the Court had an official stenographer, whose duty it was to take down all the proceedings, including objections to the admission of testimony, and hence there was no necessity for any memorandum in writing to be handed to the Judge upon any point ruled in the cause.

We submit that the rule invoked by this Court, in the language of Chief Justice Taney, was introduced

and is adhered to for purposes of justice. That there were sufficient objections taken within the rule to authorize this Court to consider the cause upon its merits.

We submit further, that this Court is bound by the act of Congress *supra*, any rule of the Court to the contrary notwithstanding.

In this case the plaintiff himself proved conclusively upon the stand that it was a stale claim, had no merit in law or morals, was a mere wrecking expedition against the funds of the defendant. Is it possible in such a case, where numerous errors have been assigned, three of them at least, well taken, and one going to the very gist of the case, that this Honorable Court will say, because the Court committed the gravest of all errors in refusing a compliance with its own rules, that the plaintiff in error cannot be heard, and that in the face of an imperative law of the Congress of the United States.

We respectfully ask for a rehearing in this case and upon such rehearing that the judgment be reversed and a new trial ordered, when all the facts in the case can be brought out, and the plaintiff in error have an opportunity to make its defense and take proper exceptions to the rulings of the Court if necessary.

Respectfully submitted,

GEORGE H. FEARONS,
RICHARD B. CARPENTER,
Attorneys for plaintiff in error.

We hereby certify that the foregoing petition is not filed for delay, but to secure justice, and that said petition is, in our opinion, well founded in point of law.

GEORGE H. FEARONS,
RICHARD B. CARPENTER,
Attorneys for plaintiff in error.